

COMPLIANCE BOARD OPINION NO. 02-10

July 10, 2002

Wayne R. Witzke

The Open Meetings Compliance Board has considered your complaint of May 7, 2002, alleging that the Wicomico County Council violated the Open Meetings Act on multiple occasions by failing to keep minutes of specified meetings in April 2002 and by failing to include in its minutes certain information about closed sessions on March 19 and April 16, 2002. In addition, your letter more generally alleges that the Council has improperly applied the executive function exception to the Act.

For the reasons set forth below, we conclude that the Council did not violate the Act on April 9, for it held no meeting on that date, and did not violate the Act with respect to much of the discussion on April 16. However, we conclude that the Council violated the Act by failing to produce minutes for the specified meetings and by failing to report information in its minutes in connection with a prior closed meeting that was determined to be subject to the Act. Furthermore, we find that, at a April 16 meeting, discussion concerning an amendment of an intergovernmental agreement did not constitute an executive function and, therefore, was subject to substantive and procedural requirements of the Act. Finally, we decline to address other issues raised in your complaint that do not refer to specific meetings at which an alleged violation occurred.

I

Complaint and Response

The central allegation in your complaint is that the Wicomico County Council has failed to keep minutes of its meetings in accordance with requirements of the Open Meetings Act. Specifically, the complaint indicated that minutes approved by the Council on April 2, 2002, failed to report information that the Council was required to provide under §10-509(c)(2)¹ in connection with a closed session held on March 19. The complaint also indicated that minutes approved May 7 did not disclose information required in connection with a meeting held on April 16. The complaint further indicated that the Council failed to produce any written minutes

¹ Unless otherwise indicated, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

for meetings held April 9, 23, 26 and 30 as required under §10-509(b) and (c)(1). The complaint pointed out that the meeting held April 9 was for the introduction of legislation.

The complaint also raised issues in connection with the Council's use of the executive function exception under the Open Meetings Act. The complaint referred us to Compliance Board Opinion 97-16, discussing the Council's role in development of the county budget as an executive function. The complaint indicated that the budget is actually prepared by the County's Administrative Director and reviewed by the Council, a quasi-legislative function. Finally, the complaint points out that "[w]orking lunches where public matters may be discussed by a quorum present are not covered, nor are 'work sessions', shielded by the executive function the Council claims is a blanket exemption."

In a timely response on behalf of the County Council, Edgar A. Baker, the attorney for Wicomico County, addressed each of the meetings discussed in your letter. At the time of the March 19 meeting, it was the Council's position that it was acting under its executive authority and the Open Meetings Act did not apply. Therefore, the minutes approved April 2 did not need to address the March 19 meeting. However, as Mr. Baker pointed out, the Compliance Board subsequently determined that certain matters considered during the March 19 meeting should have been addressed at a meeting conducted in accordance with the Act. *See* Compliance Board Opinion 02-3 (May 10, 2002). Mr. Baker informed us that the Council has therefore requested that minutes be prepared. As for the meeting held April 16, Mr. Baker discussed the matters addressed at the meeting and indicated that the Council was acting in an executive function. Therefore, the procedural requirements under the Open Meetings Act, including the obligation to report the meeting in the minutes of the next open session, did not apply. As for the meeting April 9, Mr. Baker directed us to our recent opinion concluding that, due to a lack of a quorum, no meeting occurred for purposes of the Open Meetings Act. Compliance Board Opinion 02-4 (May 21, 2002). As for the failure to produce minutes in connection with certain meetings, Mr. Baker informed us that the Council has concluded that minutes are, in fact, required in connection with the Council's work sessions and budget hearings. Apparently, the Council's administrative assistants are in the process of preparing written minutes for previous work sessions and budgetary hearings, based on records of those sessions. Finally, Mr. Baker indicated that the Council has no knowledge of any "working lunches" referred to in the complaint.

II

Discussion

A. Minutes - In General

The Open Meetings Act requires a public body to prepare written minutes of each meeting that is subject to the Open Meetings Act as soon as practicable after the meeting. §10-509(b). At a minimum, the minutes must reflect each item that the public body considered, the action taken on each item, and each recorded vote. §10-509(c)(1). Minutes must be prepared regardless of whether the session is open or closed. §10-509(c)(3). Furthermore, when a meeting is closed to the public pursuant to §10-508(a), the minutes of the next open session must include a statement of the time, place, and purpose of the closed session, the recorded vote as to the closing of the session, the statutory authority allowing the closed session, and a listing of topics discussed, persons present, and each action taken during the course of the closed session. §10-509(c)(2). *See* Compliance Board Opinion 01-5 (February 22, 2001). On the other hand, if a meeting is not subject to the Act under §10-503, none of the procedural requirements under the Act, including provisions relating to minutes, applies.

B. Specific Meetings

1. March 19, 2002

At the time of its March 19 meeting, the Council operated under the impression that it was engaged in an executive function. In its view, the Open Meetings Act did not apply. Therefore, it had no reason to provide information about the March 19 meeting in the minutes approved at its open session on April 2. However, as the Council's response acknowledged, we subsequently determined that certain matters discussed at that meeting were not outside the Open Meetings Act. Compliance Board Opinion 02-3 (May 10, 2002). Although we had no reason to address specifically the issue of minutes in that opinion, the failure to follow any procedural requirement of the Act, including §10-509(c)(2), would be a violation of the Act. We note with approval that the Council will now rectify its violation of §10-509(c)(2) in connection with the March 19 session.

2. April 9, 2002

This is the second complaint that you have submitted in connection with what the complaint characterizes as a meeting on April 9. The current complaint indicates that this meeting was for the purpose of introducing legislation, implying that the Council could not have been engaged in an executive function as defined in §10-502(d). In its response, the Council referred us to our prior opinion in which

we concluded that, for purposes of the Open Meetings Act, no meeting occurred on that date because of the lack of a quorum. Compliance Board Opinion 02-4 (May 21, 2002). For the reasons set forth in that opinion, the requirements under the Act pertaining to minutes did not apply. *See also* Compliance Board Opinion 01-4 (February 22, 2002), slip op. at 3 (with exception of notice requirement, absence of quorum rendered other issues moot).

3. *April 16, 2002*

The complaint alleges that the Council violated the Act on May 7 when it approved minutes of a meeting that failed to provide the information required under §10-509(c)(2) in connection with a closed meeting held April 16. The Council's position is that it was engaged in an executive function on April 16; consequently, the provisions of the Open Meetings Act, including the subsequent obligation for reporting of a closed session under §10-509(c)(2), did not apply.

To resolve this aspect of the complaint, we must again consider the application of the executive function exception to the Act to a meeting of the Council, which is charged with both legislative and executive responsibilities pursuant to the County Charter. *See generally* Wicomico County Charter §§301-1 and 401-1. As we recently noted, the application of the executive function exclusion to the work of public bodies with such dual responsibilities has proved the most problematic aspect of the Open Meetings Act. Compliance Board Opinion 02-3 (May 10, 2002), slip op. at 3, *citing* Compliance Board Opinion 01-7 (May 8, 2001), in which we addressed the executive function exception at length.²

The Council's response identified multiple issues addressed in the meeting held April 16. Based on the information available to us, each issue except one appears to meet the definition of "executive function." The issues appear to involve administrative matters rather than policy deliberations. For example, the Council considered the performance of certain employees, the administration of the current spending freeze, and the status of a particular project. The exception involves a report by a county official "that services being provided a municipality under an existing agreement had become burdensome and requested permission to commence negotiations for reimbursement of their time and expenses. [A request] was also made for legal advice concerning particular amendments to the agreement." An intergovernmental agreement is a type of contract. The Open Meetings Act defines the amendment of a contract as a "quasi-legislative function." §10-502(j)(3). By

² Compliance Board Opinion 01-7 addressed the application of the Open Meetings Act to the Board of County Commissioners of a county that has not adopted home rule. Although Wicomico County has adopted charter home rule, for purposes of the Open Meetings Act, the analysis of the executive function exclusion does not differ in light of the Council's dual roles.

definition, it cannot be an executive function for the purposes of the Act. §10-502(d)(2)(v). Even preliminary discussions concerning a possible amendment to the agreement should have occurred at a meeting conducted in accordance with the Act. Therefore, to the extent this portion of the meeting was conducted without complying with the substantive and procedural requirements of the Act, a violation occurred.

4. April 23, 26, and 30

The complaint indicated that the Council's failure to prepare written minutes for meetings on April 23, 26, and 30 violated §10-509. In light of the Council's apparent acknowledgment that its past practice in connection with certain "work sessions" and budgetary hearings has not complied with the Act, further discussion is not warranted. We note that the Council is taking corrective action by preparing written minutes for past sessions.

C. Miscellaneous Matters

In your complaint, you make reference to "[w]orking lunches where public matters may be discussed by a quorum," implying that the Council has violated the Act in this manner. However, you failed to refer to any specific instance in which an alleged violation occurred. Moreover, in responding on behalf of the Council, Mr. Baker indicates that "[t]o the best of our knowledge Wicomico County has no 'working lunches' as referenced [in the complaint]." The Open Meetings Act envisions that a complaint be based on a specific action of a public body, rather than an abstract allegation. *See* §10-502.5(b)(2). Although we are not averse to addressing a public body's overall practices with respect to its conduct of meetings, we do so only within the factual context of a specific alleged violation. Therefore, we decline to address this portion of your complaint.³

III

Conclusion

The Council did not violate the requirements of the Open Meetings Act related to minutes with respect to an alleged meeting on April 9, for which no quorum was present, and most items of discussion at its April 16 meeting. However, the Council's failure to comply with §10-509 in connection with its March 19 meeting and the failure to produce any minutes for certain subsequent meetings violated the Act. The discussion of potential amendments in an intergovernmental

³ For the same reason, we decline to address the complaint's suggestion that aspects of the County's budget process are subject to the Act.

agreement at the Council's meeting on April 16 did not qualify as an executive function under the Act. Thus, the failure to comply with the substantive and procedural requirements of the Act constituted a violation. Finally, we decline to address certain issues raised in your complaint absent any reference to a specific alleged violation – information that is required if we are to properly evaluate the application of the Act in context.

OPEN MEETINGS COMPLIANCE BOARD

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